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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x
4 INTERNATIONAL INSTITUTE FOR
5 THE BRAIN, LTD.,

6 Plaintiff,

7 v.

23 Civ. 638 (JPO)

8 KATELYN NEWMAN,

9 Defendant.

Teleconference

10 -----x
11 New York, N.Y.
12 February 16, 2023
13 11:35 a.m.

14 Before:

15 HON. J. PAUL OETKEN,

16 District Judge

17 APPEARANCES

18 PRYOR CASHMAN LLP
19 Attorneys for Plaintiff
20 BY: WILLIAM L. CHARRON
21 JESSICA ROSEN

22 McCALLION & ASSOCIATES LLP
23 Attorneys for Defendant
24 BY: KENNETH F. McCALLION
25 -and-
BRENNAN LAW FIRM PLLC
BY: KERRY A. BRENNAN

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(Teleconference)

(Case called)

THE DEPUTY CLERK: Starting with the plaintiff,
counsel, please state your name for the record.

MR. CHARRON: Good morning, your Honor.

William Charron and Jessica Rosen from Pryor Cashman,
for the plaintiff.

THE COURT: Good morning.

And defense counsel?

MR. McCALLION: Yes. Kenneth McCallion and my
colleague Kerry Brennan for the defendant.

Good morning, your Honor.

THE COURT: Good morning.

I scheduled this call after receiving the parties'
letters and the stipulation that you reached with respect to
the posting of certain photos that have been taken down, which
I guess mooted the hearing on requested preliminary injunctive
relief.

But I did want to have a call to address the parties'
respective positions in their letters from February 9th.

As I understand it, plaintiff wishes to commence
discovery as soon as possible and set a schedule on discovery.
Defendant, I think, opposes that and contemplates moving to
dismiss.

So let me hear from anyone who wants to speak,

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1 starting with plaintiff, Mr. Charron.

2 MR. CHARRON: Thank you, your Honor.

3 Yes, William Charron.

4 That captures it for us.

5 As we've laid out in our papers, there are some pretty
6 outrageous statements being made against our client. The
7 images of the students have been used to further sensationalize
8 and promote our client. Obviously, as I said in our letter, we
9 understand we can't get an injunction to stop the defendant
10 from speaking, but we have to do everything we can, as rapidly
11 as we can, to stop this, which means we have to litigate the
12 case as rapidly as possible.

13 THE COURT: When you say "stop this," what is "this"?

14 MR. CHARRON: The infringement of the photographs used
15 in connection with the defamation. And I can be more
16 specific --

17 THE COURT: They are no longer posted, right?

18 MR. CHARRON: They were taken down on a voluntary
19 preliminary injunction is how I would call it. But they -- I
20 believe they were all taken down as part of the stipulation,
21 the photographs. The defamation has not stopped.

22 THE COURT: The defamation -- I assume you know under
23 defamation law that statements made in the context of a court
24 proceeding are generally privileged. So people put things in
25 the context of a lawsuit, and it's very hard to get a

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1 defamation ruling based on that. So aren't these things that
2 are all ancillary to statements made in the state court
3 lawsuit?

4 MR. CHARRON: William Charron.

5 No, they are not, your Honor.

6 So we did amend, which I'll address in a moment, to
7 capture what's going on in the state lawsuit as well. But
8 before that, we had a defamation claim based upon social media
9 activity by the defendant. That's the heart of this. And that
10 did not stop.

11 As recently as February 9th, the defendant posted a
12 YouTube where she was talking about there's so much -- I'm
13 quoting now: There is so much evidence, that I do not see how
14 anyone could look the other way. This is all corruption and
15 needs to come to a stop. I can't write it all here, but you
16 follow my Instagram.

17 And she gives her Instagram tag line.

18 So the social media is the huge problem here.

19 I'll note that, as we said, the press picked up on
20 this social media -- I'm sorry, on the state court complaint;
21 and the defendant's counsel, Mr. McCallion, actually fanned the
22 flames and actually exposed himself in the process, because he
23 gave his own statement to the press saying that the plaintiff
24 had committed a "major crime."

25 So this is not getting better; it's getting worse.

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1 The state allegations, we amended our pleading to wrap
2 those in, as well as some additional social media, at least as
3 of the time of the amendment. Because we were clear about this
4 in the pleading, even though it's somewhat, I think, unusual.
5 But we cited case law to show that there is law in New York
6 that when you, as we describe it, kind of litter a pleading
7 with defamatory statements that are not in service of the
8 claims being asserted and are basically a sham, those are not
9 protected. Those are actionable.

10 And so here, that's exactly what was done. There were
11 a number of allegations put into the state pleading which were
12 obviously designed to magnetize the press, and they did
13 magnetize the press, but they are not protected. So that's
14 another part of our case.

15 THE COURT: Okay. So you have a copy right claim, a
16 libel per se claim and a breach of contract claim. Now,
17 there's not diversity between the parties, am I right about
18 that?

19 MR. CHARRON: Correct.

20 THE COURT: So you're arguing that there's
21 supplemental jurisdiction because claims two and three are part
22 of the same nucleus of operative fact as the copyright
23 infringement; is that right?

24 MR. CHARRON: Yes, your Honor.

25 THE COURT: Okay.

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1 All right. So let me hear from Mr. McCallion.

2 MR. McCALLION: Yes, your Honor.

3 We don't believe there's a need for expedited
4 discovery because the motion to dismiss that we will be filing
5 by March 3rd, we think that you will find disposes or requires
6 dismissal of the claims.

7 First of all, on the defamation claims, as your Honor
8 can plainly see from their amended pleading, they've added ten
9 paragraphs alleging, in essence, that the content of the state
10 court complaint contains defamatory statements. They don't
11 identify which ones with any particularity, but they raise that
12 issue. So we are going to have -- your Honor should either
13 dismiss those claims or abstain even, because we have an
14 anomalous situation of a state court judge evaluating issues
15 relating to the state court claim.

16 Meanwhile, the plaintiff here in federal court is
17 claiming that the heart of their defamation claim is in the
18 state court pleadings. I think your Honor will come to the
19 conclusion that these issues can only be tried in one forum,
20 and the earlier forum was the state court complaint.

21 Now, with regard to the copyright claims, these are
22 really an afterthought, strictly for purposes of manufacturing
23 jurisdiction in federal court to avoid the New York anti-SLAPP.
24 Now, why do I say that? Because plaintiff's counsel being a
25 distinguished intellectual property firm, sent a cease and

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1 desist letter to Ms. Newman, arguing that they were -- that she
2 was defaming their client. No mention was made of any
3 copyright infringement, nor could it have been, because at the
4 time the cease and desist letter was sent, they had not filed
5 for a copyright.

6 Now, when did they file for a copyright? They filed
7 for a copyright on January 17 of this year. Why is that date
8 significant? Because the day before that we filed the state
9 court complaint, and a court reporter following these filings
10 picked it up and published something, I think it was on the
11 morning of the 17th. They filed copyright claims with regard
12 to six photographs, without having put Ms. Newman on notice of
13 their intent to file a copyright relating to it. Perhaps even
14 more seriously, several of these photographs include our
15 client's, Ms. Newman's, persona, and they filed a copyright
16 claim without asking her permission and she does not consent to
17 it.

18 Moreover, we believe we'll be able to show
19 conclusively that while she was employed by iBrain, that they
20 encouraged her to use these and other photographs taken inside
21 iBrain for publicity purposes. She was their PR person, at
22 least an in-house PR person. And why do they encourage her to
23 use their Instagram account? Because Ms. Newman has a very
24 wide following, perhaps greater than that of iBrain on social
25 media. She also has several celebrities who follow her on

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1 Instagram. And she used the publication on Instagram of these
2 photos and other materials relating to iBrain to attract these
3 celebrities to come to iBrain and to assist in promoting the
4 fundraising for iBrain.

5 THE COURT: Let me just stop you for a second. Sorry
6 to interrupt. But why is any of that relevant? I often get
7 copyright cases where the registration was filed just before
8 filing suit. That's perfectly fine. I don't know that the
9 copyright becomes invalid because she's pictured in it; nor
10 does there have to be an intent -- I don't think there's some
11 intent requirement in copyrights.

12 If she was working for iBrain and they are presumably
13 iBrain's ownership pursuant to the terms of her employment or
14 whatever, so what's the argument you're making about the
15 copyright? Obviously I get the point that atmospherically
16 that's not what they were focused on. They found a hook, but
17 what's wrong with that?

18 MR. McCALLION: Well, when they filed the copyright,
19 she was not an employee; and when she was an employee, they
20 encouraged her to take the photographs, to publicize them on
21 her own accounts.

22 THE COURT: Why does that matter?

23 MR. McCALLION: And social media.

24 THE COURT: What does that matter? Isn't it still
25 their copyright?

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1 MR. McCALLION: Well, we think that is certainly
2 arguable using -- first giving her permission and then, without
3 putting her on notice, withdrawing -- well, they never put her
4 on notice that they are withdrawing permission; they sued her
5 for \$2.9 million. She did not know that they had a copyright
6 when they filed for the copyright. We found out obviously when
7 they filed the federal court case. So there's certainly no
8 damage --

9 THE COURT: I don't think there's a knowledge
10 requirement for copyright infringement, is there?

11 MR. McCALLION: Well, I'll defer to my colleague Kerry
12 Brennan on that. I suppose not. But certainly it goes to the
13 issue as to what the damages might be. Ms. Newman did not use
14 it for business or publicity purposes. And it's an *in terrorem*
15 filing by them seeking 2.9 million or so from her. The intent
16 is to have a chilling effect on her exercise of her First
17 Amendment rights.

18 But I agree, your Honor, that we think some, if not
19 all, would be dismissed on a motion to dismiss, and certainly
20 there's no diversity. The state court claims their challenge
21 to the complaint in state court is not properly asserted or
22 litigated in federal court on a defamation claim based upon the
23 contents of a state court filing. So that will be the heart of
24 our motion to dismiss.

25 So with regard to this conference, we think that

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1 there's no need to expedite discovery; that until the issues
2 are joined and we believe will be focused or at least granted
3 in part based on the motion to dismiss, that your Honor should
4 schedule, if necessary, a 26(f) conference after deciding the
5 motion to dismiss or answer by our client. And we argue that
6 now there cannot be a full and complete discussion of a
7 discovery necessary in this case until your Honor decides the
8 motion to dismiss and decides what claims, if any, will survive
9 that motion. Thank you.

10 THE COURT: You mentioned New York anti-SLAPP law.
11 Are you suggesting that that somehow does not apply in federal
12 court?

13 MR. McCALLION: Well, it most certainly applies in
14 state court. The issue is evolving, and I'll defer to my
15 colleague for any further details. But my understanding of the
16 state of law in the Second Circuit at this point is while
17 certain procedural aspects of the New York anti-SLAPP law may
18 not apply in federal court; that the substantive elements of an
19 anti-SLAPP suit better be on a public forum, an issue of public
20 interest, etc., are applicable. There's at least one Eastern
21 District case on that. It may well be evolving, and this case
22 might add to that case law. So we do think it's likely -- at
23 least the current state of play is that it's both yes and no,
24 depending on whether you're looking at procedural or
25 substantive issues.

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1 And counsel on the other side carefully researched
2 this and decided that they had needed to get a federal hook to
3 do an end-run around the state court filing.

4 THE COURT: Okay. I don't know the latest. I've
5 certainly applied anti-SLAPP laws in defamation cases. I can't
6 remember the name of the case, but I have definitely done it.
7 But there may have been some changes in the law since then.

8 In any event, I'm not sure any of that is relevant;
9 they are motivation for filing this case in federal court
10 versus state court. It doesn't, I don't think, really matter.
11 If they have federal -- if I have federal jurisdiction, I have
12 it.

13 What I thought you were going to say is that the basis
14 for supplemental jurisdiction on the state court claims isn't
15 sufficiently connected to the copyright claim to warrant
16 supplemental jurisdiction. Because the breach of contract and
17 defamation related to her specific statements are kind of
18 really very different from -- arguably different from her use
19 of the photos, which is just a kind of different kind of claim.

20 MR. McCALLION: I forgot to say that. Thank you, your
21 Honor. I'm sorry, I was focusing on the unusual pleadings in
22 the amended complaint, arguing the basis for defamation, the
23 contents of the state law complaint. Sorry, I got off on a
24 tangent, perhaps a tangential issue.

25 THE COURT: Ms. Brennan, did you want to add anything?

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1 Your colleague has mentioned you a couple of times, so I don't
2 want to go away without giving you your chance.

3 MS. BRENNAN: No. The only thing I would add is that
4 we would add to our motion to dismiss to address the
5 anti-SLAPP, because it appears that this case, this entire
6 federal court case, was brought to chill her free speech; and
7 that if the case isn't dismissed, we would have an anti-SLAPP
8 counterclaim.

9 THE COURT: All right.

10 So, Mr. McCallion, Ms. Brennan, you represent the
11 plaintiff -- sorry, the defendant here as the plaintiff in the
12 state court case. What's going on with the state court case?
13 Where does that stand?

14 MR. McCALLION: Well, at this particular point, there
15 has not been an answer for a motion. I have to get together
16 with counsel on that issue, quite frankly, given the TRO, etc.,
17 and the activity to date in the federal case, quite frankly, we
18 have been focused on that. But we intend to vigorously pursue
19 the state court claim.

20 However, it is very -- it is somewhat difficult to do
21 that if at the same time we're defending a defamation case
22 based on those same pleadings in federal court. So, quite
23 frankly, we're putting our energy right now into the motion to
24 dismiss due March 3rd, so that you can decide one way or the
25 other whether we'll be litigating defamation in two forums or

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1 in one.

2 THE COURT: Mr. Charron, are you counsel for iBrain in
3 the state court?

4 MR. CHARRON: Yes, your Honor.

5 THE COURT: Okay. Anything else you wanted to add
6 with respect to those various matters Mr. McCallion and
7 Ms. Brennan have been discussing?

8 MR. CHARRON: William Charron.

9 I'm looking forward to opposing their motion to
10 dismiss. I heard all of their stated grounds. We're not
11 concerned by any of those arguments. We think your Honor
12 picked up on all the right points there.

13 With respect to the question of supplemental
14 jurisdiction, this will become clear in the briefing as well,
15 if they end up briefing this argument.

16 But we do believe that the use of the photos here
17 are -- they arise out of the same transaction occurrence and
18 common nucleus of operative facts. Because she is breaching
19 her contract. As counsel said, she was their PR person; these
20 are works for hire; they are subject to her contract, which she
21 has breached; and her use of the photos relates to her contract
22 breaches. And she's also appended the photos to the defamatory
23 post. She was doing that liberally before the voluntary
24 preliminary injunction and, undoubtedly, would do so again.
25 And so it's all -- we believe it is all related.

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1 And the last thing I would say is that there's no rule
2 that discovery should be stayed pending a motion to dismiss.
3 And again, we think this is -- we're asking the Court to please
4 put in a schedule now so we can get started, because we are not
5 going to be able to get the relief we really need completely
6 without litigating and showing our pleading is indeed
7 particularized and shows that these are specifically false
8 statements. But we need to do that through the litigation
9 process and get this resolved.

10 MS. BRENNAN: Your Honor, this is Kerry Brennan. If I
11 could raise one more thing.

12 THE COURT: Sorry, who is speaking?

13 MS. BRENNAN: This is Kerry Brennan. May I raise one
14 more thing?

15 THE COURT: Yes, of course.

16 MS. BRENNAN: One of the reasons -- one of the other
17 bases we'll be moving to dismiss is we think the Court, under
18 abstention principles, with respect to both the libel claim and
19 the breach of contract claim related to the state court
20 proceeding, that's something that this Court should abstain
21 from hearing and either dismiss or stay that. So that is
22 something that we are going to be raising. I think that's
23 something the Court needs to decide.

24 At this point, there's really no reason to commence
25 discovery. Our client has agreed to cease use of the

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1 photographs. And counsel for the plaintiff here has not
2 indicated, other than supposition, as to her use of those in
3 the future. If she were to use the photographs or any other
4 material that they believe is inappropriate in the future, they
5 could raise that. But at the current time, there's no reason
6 to suspect that our client would do that. So we don't see any
7 reason that we need to expedite discovery prior to all of the
8 claims being joined.

9 THE COURT: Two responses to that.

10 One is apparently on February 9th, according to
11 Mr. Charron, your client posted again some other things that
12 they say constitute defamatory statements, which was even -- I
13 think was even after she took down the challenged copyright
14 post, right?

15 MS. BRENNAN: I mean, that is what he is alleging.

16 THE COURT: Right.

17 The other question I have is why not start discovery?
18 Irrespective of the jurisdictional issues, the extension
19 issues, one way or another, whether it goes forward in the
20 context of the state court or it goes forward in the context of
21 this Court, seems like the discovery is going to happen one way
22 or another. And I mean, I'm not -- I have no idea what the
23 truth of all this is. But you all have put all this stuff in a
24 pleading in an employment case, and I wonder if it's fair.
25 It's kind of making iBrain fight with one hand behind its back

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1 when it doesn't get discovery to go forward and explore those
2 claims that you had put at issue at least in the state court
3 matter. Either Mr. McCallion or Ms. Brennan, why not start
4 discovery? One way or another, you're going to be doing this
5 discovery, right?

6 MS. BRENNAN: The reason I raise the abstention issue
7 is that one of the criteria under whether this Court should
8 abstain is the status of the two cases. And I believe that the
9 reason that they went -- they asked for this expedited
10 discovery is because they are trying to get an advantage under
11 the extension principles, when they are trying to get this case
12 ahead of the state court before we file our motion to dismiss
13 in order to kind of moot that particular criteria that this
14 Court is going to have to examine as to the status of the two
15 cases. And therefore we can't consent to that, particularly
16 with respect to the defamation claims.

17 THE COURT: That's a clever argument.

18 Mr. Charron, do you want to respond?

19 MR. CHARRON: William Charron.

20 So I don't believe the abstention doctrine applies
21 here. It was sort of raised after the fact. And it's not
22 something we had considered.

23 But, in any event, the ultimate issue is going to be
24 whether the Court -- as your Honor said, does the Court have
25 jurisdiction or not. Your Honor has heard sort of the

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1 prefatory observations by both sides on that question, and I
2 think is in a position to make -- have an initial instinct on
3 whether the Court has jurisdiction. If the Court has
4 jurisdiction, this case should proceed, and we believe it
5 should proceed as rapidly as possible for the reasons I stated.
6 We really need it to.

7 THE COURT: All right. I'm going to think about this
8 one for a couple of days. And I'm not certain yet, but you've
9 made good arguments. And I'm going to think about this and I
10 will let you know what I'm going to do.

11 Initially I was thinking I was going to wait and take
12 a look at the motion to dismiss, which I sometimes do. Because
13 if it's a partial motion to dismiss, other considerations, the
14 strength of the argument, sometimes I have discovery go
15 forward.

16 But to be clear, Mr. McCallion and Ms. Brennan, you're
17 not asking for a stay of discovery, are you, or are you?

18 MR. McCALLION: Well, I guess in a sense we are
19 pending the motion to dismiss. There's no stay of discovery on
20 the state court case, and nor would we request one. And that
21 litigation can move forward. There's no impediment on the
22 plaintiff -- or on the defendant in the state court case to
23 propound discovery in that particular case. We'll move forward
24 on the defamation claims which they've asserted in the federal
25 case, but are identical presumably to their defense or

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1 counterclaim in the state court case.

2 So they are certainly not fighting with one hand
3 behind their back. They certainly have a state court forum to
4 pursue that. They have not filed a motion or answered. But
5 all of their discovery remedies are available in state court.

6 In part, we're respectfully requesting that the Court
7 stay discovery at least until we have an opportunity to file a
8 motion to dismiss. We put it on a pretty tight schedule. We
9 agreed to March the 3rd, which is not that far around the
10 corner. And, quite frankly, we've been focusing a lot of
11 energy on coming to a stipulation on the injunctive relief
12 issue. And we would respectfully request an opportunity to
13 focus on the motion to dismiss at this point and give your
14 Honor an opportunity, as you say, to at least take a look at
15 those issues as they are framed.

16 THE COURT: All right.

17 Mr. Charron, anything you want to -- I don't want to
18 make you answer this question if you don't want to, but
19 anything you want to say about whether discovery will be going
20 forward in the state court matter or whether you'll be moving
21 for a stay there?

22 MR. CHARRON: William Charron.

23 Your Honor, Mr. McCallion had agreed to a 45-day
24 period for our clients to answer, move, or otherwise respond.
25 I believe that time expires in mid March. We do expect to move

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1 to dismiss all of the claims in that case. And as I have
2 already indicated and as we pleaded, the claims -- I'm sorry,
3 the allegations in that case that are defamatory against our
4 client don't actually relate to the claims that the defendant
5 has asserted in the state court action. They are extraneous.
6 So I guess that would be my answer for now.

7 THE COURT: Okay.

8 Final question: Have you all talked about settlement,
9 and is there anything I can do in that regard that might be
10 helpful at this point?

11 MR. CHARRON: William Charron.

12 No is the short answer on settlement.

13 The longer answer, I suppose, is that before any of
14 the litigation started, I had spoken with Mr. McCallion and
15 asked him whether there might be a way for the parties to come
16 together to try to resolve this when this was just at a, at
17 that point, still somewhat limited social media campaign. And
18 there was no response to that.

19 And since that time and since the filing of this case,
20 the activities of the defendant have continued and only picked
21 up steam. So I am pessimistic at this point that without
22 really getting into discovery, there's not going to be any real
23 movement.

24 THE COURT: All right.

25 Mr. McCallion, Ms. Brennan?

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1 MR. McCALLION: Well, I think that we are pleased to
2 see that we're able to work at least on a stipulation
3 settlement of the injunctive relief issue. I think both
4 parties, despite perhaps the atmospherics -- heated
5 atmospherics around it were able to accomplish that. And,
6 quite frankly, we think that given the passage of time -- we
7 are not monitoring her social media, but I had thought that her
8 social media presence relating to this issue had gone
9 quiescent.

10 We'll look into this YouTube issue that Mr. Charron
11 raises, but I don't think it's necessarily a correct
12 characterization that she is intensifying her efforts. Quite
13 frankly, I think she's gone on to do other things. I know
14 she's working on other projects completely. And it comes as a
15 surprise to me that she's still doing social media.

16 I will certainly look into that, but I think there
17 would be a good basis for a resolution, if, in fact, she
18 decides to move on to other public issues, which she has. We
19 know she's working on other matters and I'm just surprised to
20 see that she's still posting anything here.

21 So I understand that will be a condition precedent of
22 a settlement. We'll certainly look into it. But we're not
23 really following her social media. But we certainly will -- we
24 certainly will monitor that as closely as possible and see if
25 there's a basis for a resolution.

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1 MR. CHARRON: Your Honor, it's William Charron.

2 May I just add one more thing in response to that?

3 THE COURT: Sure.

4 MR. CHARRON: As we put in paragraph 69 of our amended
5 pleading, it's not only kind of a broad-based social media
6 campaign; it's a targeted campaign by the defendant over at
7 least LinkedIn to reach out unsolicited to business affiliates
8 of our client, to -- I'm quoting now, wanted to confirm you
9 are -- I think she meant partnered with the corrupt institute
10 known as iBrain. If yes, no worries; if not, they claim you
11 are one, so I wanted to warn you. I read your impressive
12 background. And if you are partnered, I recommend reading the
13 truth online about them.

14 So it's both a generalized and a very specific
15 targeted campaign. Short of the defendant very, very publicly
16 and comprehensively apologizing, recanting, I don't see how we
17 get to anything to even start a settlement discussion.

18 THE COURT: Okay. Well, I'll just leave that there.
19 If the parties -- if and when the parties reach a point where
20 they are interested in a settlement conference, I'd be happy,
21 of course, to refer you to Magistrate Judge Moses, who's
22 designated in this case, or to the court's mediation panel.
23 I'll assume that since we have some briefs coming in and I'll
24 be issuing an order on what to do with respect to discovery
25 shortly, that you'll at least wait until then. But if at any

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1 point if you do reach a point where that would be helpful, just
2 let me know with a letter. I don't typically force parties
3 into settlement conferences unless both parties or all parties
4 are open to it; otherwise, it's usually a waste of time.

5 All right. That's enough to cover today. I'll be
6 issuing an order within the next week or so on discovery, and
7 we'll go from there.

8 Anything else for today from plaintiff's counsel?

9 MR. CHARRON: William Charron.

10 No. Thank you very much, your Honor.

11 THE COURT: Thank you.

12 And from defense counsel?

13 MR. McCALLION: No, thank you, your Honor.

14 THE COURT: Thanks, everyone. We are adjourned.

15 Have a good day.

16 * * *